

Before the
PUBLIC UTILITY COMMISSION
OF TEXAS

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PUBLIC UTILITY COMMISSION
DALLAS, TEXAS

In the Matter of

Complaint of Level 3 Communications, LLC,
Against CenturyTel of Lake Dallas, Inc., and
CenturyTel of San Marcos, Inc.

Docket No. 26431

MOTION FOR RECONSIDERATION OF LEVEL 3 COMMUNICATIONS, LLC

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Pursuant to §§ 21.75 and 21.95(w) of the Commission's substantive rules,¹ Level 3 Communications, LLC ("Level 3"), hereby moves for reconsideration of the Arbitration Award filed by the arbitrators in the above-captioned arbitration between Level 3 and CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc. (collectively, "CenturyTel"), on the grounds that the Arbitration Award is inconsistent with federal law.² Commission reconsideration of the Arbitration Award is imperative both as a procedural and substantive matter, as the arbitrators failed to issue a Proposal for Award or to entertain exceptions from the parties to such a proposed award, as the Commission's rules otherwise required them to do.³

¹ P.U.C. SUBS. RULES 21.75 and 21.95(w).

² See Arbitration Award, PUC Docket No. 26431 (filed Mar. 11, 2004).

³ See P.U.C. SUBS. RULE 21.95(t)(1)-(3).

BACKGROUND

Level 3 seeks to interconnect with CenturyTel to offer competitive Internet service provider ("ISP") services to Texas consumers living in CenturyTel's service areas. Level 3 has agreed to interconnect with CenturyTel in every CenturyTel local calling area in which Level 3 will be offering service.⁴ Level 3 will incur the cost of taking the traffic from the CenturyTel local calling area back to the Level 3 switch, and then on to Level 3's ISP customers. The Arbitration Award, however, undermines the availability of competitive Internet service provider ("ISP") services in Texas, particularly its rural areas, by allowing CenturyTel to discriminate in favor of its own ISP customers. Unless modified, the Arbitration Award would allow CenturyTel to impose on Level 3's ISP-bound traffic origination charges that are illegal under federal law.

Functionally, Level 3 seeks to provide the same service to ISPs that CenturyTel does: carrying traffic between local service customers and ISPs who purchase local service or foreign-exchange ("FX") type service from CenturyTel itself.⁵ Yet, the arbitrators' award perpetrates a regulatory anomaly by subjecting this connectivity to ISPs to separate interconnection requirements, notwithstanding protestations to the contrary in deciding Issue 1 in the arbitration. By subjecting CenturyTel's own ISP-bound traffic to the same interconnection requirements as local telecommunications traffic, while subjecting Level 3's ISP-bound traffic (which originates with a CenturyTel customer and is exchanged with Level 3 within the CenturyTel local calling area in which the call originated and is then transported and terminated by Level 3) to separate

⁴ Level 3 is unable to provide specific point of interconnection ("POI") information because the Parties' engineering and network personnel have not discussed those locations, and such discussions won't take place until an intercon agreement is approved by this Commission.

⁵ See Initial Post-Hearing Brief of Level 3 Communications, LLC, Docket No. 26431, at 28-32 (filed Nov. 27, 2002) ("Level 3 Initial Post-Hearing Brief").

interconnection requirements, including payment of access charges or tariffed FX rates to CenturyTel, the Arbitration Award precludes Level 3 from competing in the ISP market in the CenturyTel service area. Unless reconsidered and modified, the Arbitration Award would inflate the costs for any ISP that is served by Level 3, because—for the ISPs that CenturyTel serves directly—CenturyTel pays no access charges and therefore need not pass through any such charges to its customers.⁶ It would also otherwise permit CenturyTel to charge Level 3 for call origination even though it is Level 3, rather than CenturyTel, that will provide the FX-like service to the Level 3 ISP customer—a practice clearly and correctly prohibited by the Federal Communications Commission (“FCC”).⁷

The FCC has stated that the ban on origination charges—codified in § 51.703(b) of its rules—ensures that the costs of delivering telecommunications traffic to the point of interconnection (“POI”) are borne by the originating carrier as the originating carrier recovers its costs through the rates it charges to its own customers for making calls.⁸ CenturyTel, like other local exchange carriers (“LECs”), provides connectivity to other network operators and charges a monthly fee to its customers for doing so, recovering its costs and earning a profit. So CenturyTel’s carriage of its customers’ traffic to the POI with Level 3 is not a case of Level 3

⁶ See *id.* at 41-45.

⁷ 47 C.F.R. § 51.703(b) (stating that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”). See also Tr. 288:10-12 (where Level 3 witness Gates testified that Level 3 will provide the FX-like service to Level 3 customers).

⁸ *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc. and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, Memorandum Opinion and Order*, 17 FCC Rcd. 27,039, 27,065 ¶ 52 (Wireline Comp. Bur. 2002) (“*Virginia Arbitration Order*”) (stating that “to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic”).

imposing costs on CenturyTel to the sole benefit of Level 3.⁹ To the contrary, as the D.C. Circuit has noted, the ban on origination charges ensures that LECs such as CenturyTel do not “game the system” by forcing interconnecting carriers such as Level 3 to pay for dedicated facilities that LECs such as CenturyTel could conveniently carry at their own expense.¹⁰ Moreover, the physical location of Level 3’s ISP customers impose on CenturyTel any additional costs, as Level 3 will carry the traffic exchanged with CenturyTel from the POI back to its’ switch and customer location.¹¹

The arbitrators made four principal legal errors in the Arbitration Award. *First*, in deciding Issues 2, 3, and 4 and adopting language for the proposed interconnection agreement, the arbitrators failed to apply their conclusion with respect to Issue 1, namely, that ISP-bound traffic is subject to the same interconnection requirements as local telecommunications traffic. *Second*, by characterizing Level 3’s ISP-bound traffic as interstate or “non-local,” the arbitrators ignored FCC and judicial statements to the contrary and violated the FCC’s local competition rules, particularly the ban on origination charges for any telecommunications traffic, including ISP-bound traffic. *Third*, the arbitrators erred in refusing to adopt the FCC’s definition of “bill-and-keep.” Consequently, Level 3 requests that the Commission remedy these legal errors on reconsideration by deciding Issues 2, 3 and 4 in Level 3’s favor and by adopting Level 3’s proposed interconnection agreement language, as set forth in Attachment B to the Arbitration

⁹ See, e.g., Arbitration Award at 12.

¹⁰ *Qwest Corp. v. FCC*, 252 F.3d 462, 467 (2001) (“*Qwest*”), affirming *TSR Wireless, LLC et al. v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11,166 (2000) (“*TSR Wireless*”).

¹¹ Hearing Tr. 479:22-480:2 (Level 3 witness Gates pointing out that CenturyTel agreed it would not incur any additional costs depending on the Level 3 customer location).

Award.¹² *Fourth*, the arbitrators erred by failing to comply with the Commission's rules for compulsory arbitrations in interconnection disputes, rendering the Arbitration Award invalid unless reconsidered and modified by the Commission.

I. ALTHOUGH THE ARBITRATORS CONCLUDED THAT ISP-BOUND TRAFFIC IS SUBJECT TO THE SAME INTERCONNECTION REQUIREMENTS AS LOCAL TELECOMMUNICATIONS TRAFFIC UNDER FEDERAL LAW, THEY FAILED TO APPLY THEIR CONCLUSION ELSEWHERE IN THE AWARD OR IN THEIR CHOSEN CONTRACT LANGUAGE

Although the arbitrators correctly concluded that ISP-bound traffic is not subject to different interconnection requirements than local telecommunications traffic under federal law, they nonetheless erred as a matter of law by refusing to apply those federal interconnection requirements to Level 3's ISP-bound traffic as they chose interconnection agreement language. In deciding Issue 1, the arbitrators correctly found that the FCC's *ISP Order on Remand* did not alter the interconnection requirements applicable to ISP-bound traffic.¹³ Nevertheless, the arbitrators concluded that they "are not persuaded by Level 3's logic that the interconnection rules of local traffic will necessarily apply."¹⁴ Consequently, the arbitrators' purported decision on Issue 1—agreeing with Level 3 that ISP-bound traffic is not subject to separate interconnection requirements under federal law—does not square with the interconnection agreement language actually adopted by the arbitrators with respect to Issue 1.¹⁵

¹² Arbitration Award, Attachment B – Decision Point List Matrix ("Decision Matrix").

¹³ Arbitration Award at 12-14. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151 (2001) ("*ISP Order on Remand*"), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

¹⁴ *See* Decision Matrix, Issue 1, Arbitrators' Position (Arbitration Award at 52).

¹⁵ *See id.*, Arbitrators' Contract Language (striking Level 3's language for Article II, § 1.49(a) and adopting CenturyTel's language for Article V, §§ 1.1, 3.2.1, 3.2.2, 4.2, 4.3.1, 4.3.2, 4.3.3, and 4.3.5 so as to subject Level 3's ISP-bound traffic to interconnection requirements different from those of "local" telecommunications traffic).

A. Level 3's ISP-Bound Traffic Is Subject to the Same Interconnection Rules as Other Telecommunications Traffic

Level 3's ISP-bound traffic is subject to the same FCC interconnection rules as other telecommunications traffic. Footnote 149 of the FCC's *ISP Order on Remand*, in which the FCC clarified that its interim intercarrier compensation regime for ISP-bound traffic, stated that the FCC's preemption:

affects only the intercarrier *compensation* (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.¹⁶

The FCC stated that it was "unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic."¹⁷ The FCC sought to prevent incumbent LECs such as CenturyTel from manipulating the system to collect more advantageous charges for ISP-bound traffic.¹⁸ Thus, the FCC stated clearly and unambiguously that it was not otherwise altering interconnection obligations with respect to ISP-bound traffic or precluding state-commission jurisdiction to arbitrate and enforce those interconnection obligations.

Level 3 has sought interconnection with CenturyTel under FTA §§ 251(a) and 251(b), and under § 251(c)—to the extent that CenturyTel is not a rural telephone company with an

¹⁶ *ISP Order on Remand*, 16 FCC Rcd. at 9187 ¶ 78 n.149. See also *id.* at 9152 ¶ 1 (noting that "[i]n this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)." (emphasis added)).

¹⁷ *Id.* at 9194-95 ¶ 90.

¹⁸ *Id.* at 9193 ¶ 89 (noting that "[b]ecause we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier.").

exemption pursuant to FTA § 251(f)(1)—for purposes of exchanging calls placed by CenturyTel's end user customers to Level 3's end user ISP customers.¹⁹ Consequently, the FCC rules governing interconnection under FTA §§ 251(a), (b), and (c) govern the proposed interconnection agreement between Level 3 and CenturyTel, including the proposed exchange of ISP-bound traffic.

B. The Arbitrators Impermissibly Distinguished between "Local" ISP-Bound Traffic and "Non-Local" ISP-Bound Traffic

Although the arbitrators appeared to agree with the proposition that ISP-bound traffic is subject to the same interconnection requirements as other telecommunications traffic,²⁰ the arbitrators impermissibly attempted to distinguish between "local" ISP-bound traffic and "non-local" ISP-bound traffic.²¹ This distinction has no basis in the FCC's rules or in judicial decisions interpreting those rules. Nowhere has the FCC attempted to single out a subset of "non-local" ISP-bound traffic and subject it to separate interconnection requirements under FTA § 251.

Consistent with the admonishments of the courts, the FCC has clarified that *all* ISP-bound traffic that is subject to the FCC's interconnection rules also apply to local telecommunications traffic. Indeed, the D.C. Circuit vacated and remanded the FCC's initial conclusion that LEC traffic terminated to ISPs was not treated in the same manner as local.²² In doing so, the court confirmed the hybrid nature of ISP-bound traffic. On the issue of whether ISP-bound traffic is local or long-distance, the court stated that "[n]either category fits clearly."²³

¹⁹ See Level 3 Arbitration Request at 1.

²⁰ Arbitration Award at 13.

²¹ *Id.*; Decision Matrix, Issue 1, Arbitrators' Position (Arbitration Award at 52).

²² *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000) ("*Bell Atlantic*").

²³ *Id.* at 5.

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.²⁴

Responding to the D.C. Circuit's vacatur and remand in *Bell Atlantic*, the FCC in its *ISP Order on Remand* simply abandoned the application of its "end-to-end" analysis as a basis for carving ISP-bound traffic out of the intercarrier compensation regime it applies to other telecommunications traffic, noting that it had "erred in focusing on the nature of the service (*i.e.*, local or long distance)" in interpreting § 251(b)(5).²⁵ The FCC even deleted the word "local" from its definition of "telecommunications traffic."²⁶ Thus, the FCC has made clear that the relevant question for interconnection purposes is not whether the traffic is local or long-distance, but whether it is telecommunications traffic that is not otherwise exempted from the FCC's ban on origination charges, as discussed further in part II below.

C. The Arbitrators Misapplied to Level 3 the FCC's Unrelated Concerns About Regulatory Arbitrage Arising from Usage-Sensitive, Per-Minute Reciprocal Compensation

In stating that Level 3 intended to defy Congress's intentions in the FTA and engage in regulatory arbitrage, the arbitrators misapplied the FCC's conclusions regarding usage-sensitive, per-minute reciprocal compensation.²⁷ In fact, the FCC's regulatory arbitrage concerns have no bearing on the present arbitration dispute.

²⁴ *Id.*

²⁵ *ISP Order on Remand*, 16 FCC Rcd. at 9164 ¶ 26.

²⁶ *ISP Order on Remand*, 16 FCC Rcd. at 9173-74 ¶ 46. Likewise, the FCC has consistently described ISP-bound traffic as containing both intrastate and interstate components. *Inter-carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd. 3689, 3705 ¶ 25 (1999) ("*ISP Order*"), *vacated and remanded Bell Atlantic*, 206 F.3d at 1.

²⁷ *See, e.g.*, Arbitration Award at 12, 34-35. The arbitrators' concerns about Level 3's compliance with Substantive Rule § 26.114 are likewise mistaken and misplaced. Level 3

In the *ISP Order on Remand* and the initial *ISP Order*, the FCC expressed concern about competitive LECs over-recovering for the costs of their services through traffic-sensitive, per-minute charges for terminating reciprocal compensation.²⁸ The FCC feared regulatory arbitrage, where competitive LECs would seek out customers with huge one-way traffic volumes, recovering their costs from incumbent LECs rather than their customers, and even reaping a windfall.²⁹

Here, however, there are no traffic-sensitive per-minute terminating reciprocal compensation charges or windfalls, as Level 3 has not sought to collect per-minute, terminating reciprocal compensation charges from CenturyTel.³⁰ And the arbitrators' conclusion that Level 3 would "reap profits" only underscores that the arbitrators misunderstood both the FCC's policy concerns in the *ISP Order on Remand* and the very nature of "bill-and-keep" arrangements (as discussed further in relation to Issue 4 below), which do not generate traffic-sensitive windfalls.³¹ To the contrary, the proposed interconnection arrangements between Level 3 and

currently relies on its certificate from the Commission to provide service as a competitive LEC in Texas, particularly in the service areas of the Southwestern Bell Telephone Company. As for the CenturyTel service areas, it is unsurprising that Level 3 has not yet been able to provide service there, given Level 3's inability to conclude an interconnection agreement with CenturyTel. Level 3 first entered into interconnection negotiations with CenturyTel in early 2002, and filed its petition for arbitration in August 2002. See Petition of Level 3 Communications, LLC, for Arbitration Pursuant to 47 U.S.C. § 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc., Docket No. 26431 (filed Aug. 8, 2002) ("Level 3 Petition").

²⁸ See *ISP Order on Remand*, 16 FCC Rcd. at 9181-84 ¶¶ 68-71; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *ISP Order*, 14 FCC Rcd. at 3707 ¶ 28.

²⁹ *ISP Order on Remand*, 16 FCC Rcd. at 9182-83 ¶¶ 69-70.

³⁰ See Letter from Rogelio E. Peña, Counsel for Level 3 Communications, LLC, to Harvey Perry, CenturyTel, Inc., General Counsel (Mar. 1, 2002) ("Level 3 Arbitration Request"), attached as Exhibit A to Level 3 Petition.

³¹ See Arbitration Award at 34-35.

CenturyTel raise concerns about CenturyTel's compliance with the FCC's ban on origination charges, which requires that the originating carrier (i.e., CenturyTel) bear the costs of facilities used to deliver telecommunications traffic to the POI and recovers those costs through the rates it charges to its own customers for making calls.³²

II. BY CHARACTERIZING LEVEL 3'S ISP-BOUND TRAFFIC AS INTERSTATE OR "NON-LOCAL," THE ARBITRATORS IGNORED FCC AND JUDICIAL STATEMENTS TO THE CONTRARY AND VIOLATED THE BAN ON ORIGATION CHARGES FOR ANY TELECOMMUNICATIONS TRAFFIC

The arbitrators' decision to characterize ISP-bound traffic alternatively—and inconsistently—as interstate or “non-local” traffic ignores FCC and judicial findings to the contrary and violates the FCC's ban on origination charges for any telecommunications traffic. The arbitrators' erroneous characterization of ISP-bound traffic as “non-local” led the arbitrators to decide in CenturyTel's favor with respect to interrelated Issues 2 and 3.³³ With respect to Issue 2, the arbitrators relied on legally impermissible and inconsistent rationales—that Level 3's ISP-bound traffic is, alternatively, either exclusively interstate in nature, or “non-local” because Level 3 lacks a physical presence in every one of CenturyTel's local calling areas—to find that the interconnection agreement must exclude ISP-bound traffic from the definition of “local” traffic.³⁴ With respect to Issue 3, the arbitrators erroneously found that the interconnection agreement must require Level 3 to pay access charges or tariffed rates for traffic originated by CenturyTel customers and transported by CenturyTel to the POI with Level 3—thereby ignoring

³² See *Virginia Arbitration Order*, 17 FCC Rod. at 27,064 ¶ 52; 47 C.F.R. § 51.703(b).

³³ Oddly, the arbitrators adopted Level 3's proposed interconnection agreement language for Issues 2 and 3, on the theory that their conclusion with respect to Issue 1—that Level 3's ISP-bound traffic is not “local”—ensures that Level 3's proposed language for Issues 2 and 3 in no way qualifies Level 3's ISP-bound traffic for treatment as “local” traffic or exempts it from access charges or tariffed FX rates imposed by CenturyTel. See Decision Matrix, Issues 2 and 3, Arbitrators' Position (Arbitration Award at 57-59).

³⁴ See Arbitration Award at 14-23.

the FCC's ban on origination charges for ISP-bound traffic.³⁵ This characterization also underscores the arbitrators' failure to adopt interconnection agreement language consistent with their conclusions on Issue 1 (as discussed in part I above) and their unwillingness to adopt the FCC's definition of "bill-and-keep" in resolving Issue 4 (as discussed in part III below).

A. The Arbitrators Mistakenly Characterized ISP-Bound Traffic as Exclusively Interstate Traffic

The arbitrators' assertion that the FCC has defined ISP-bound traffic as exclusively interstate both misreads the relevant FCC and court statements to the contrary and is wholly inconsistent with the arbitrators' decision that the Commission has jurisdiction to arbitrate interconnection disputes and enforce interconnection agreements involving ISP-bound traffic.³⁶ To the contrary, the FCC and the courts have long characterized ISP-bound traffic as a hybrid, thereby enabling the shared jurisdiction under §§ 251 and 252 as described by the FCC.

As noted in part I.B above, the D.C. Circuit confirmed the hybrid nature of ISP-bound traffic as it vacated the FCC's previous attempts to draw a local/non-local distinction, stating that "[n]either category fits clearly."³⁷ Consistent with this approach, the Eleventh Circuit, sitting *en banc*, affirmed the Georgia Public Service Commission's decision to treat ISP-bound traffic as local under the interconnection agreement between BellSouth and MCImetro.³⁸

³⁵ See *id.* at 23-35. The Arbitration award also ignores the fact that Level 3, rather than CenturyTel, will provide Level 3's ISP customers with an FX-like service. Tr. 288:10-12; Tr. 291:5-9; Tr. 293:8-16.

³⁶ See Arbitration Award at 34. The arbitrators made this erroneous conclusion in discussing Issue 3, although it is more appropriately addressed in the context of Issue 2 and the meaning of "local."

³⁷ *Bell Atlantic*, 206 F.3d at 5. See also Level 3 Initial Post-Hearing Brief at 11-12.

³⁸ *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th. Cir. 2003).

B. The Arbitrators Failed to Apply § 51.703(b) of the FCC's Rules, Which Prohibits LECs From Charging Other Telecommunications Carriers for Originating Telecommunications Traffic and Carrying that Traffic to the POI

The arbitrators failed to apply § 51.703(b) of the FCC's rules, which prohibits LECs from charging other telecommunications carriers for originating telecommunications traffic—including *ISP-bound traffic*—and carrying that traffic to the POI. Rather than examine the language of the FCC's rules or its *TSR Wireless* decision—affirmed in two appellate court decisions—the arbitrators stated summarily that they did not find Level 3's arguments regarding § 51.703(b) “persuasive.”³⁹ Nevertheless, the plain language of the FCC's rules—which the arbitrators failed to parse—provides that ISP-bound traffic is telecommunications traffic subject to § 51.703(b).

Section 51.703(b) provides that “[a] LEC may not assess charges on any other telecommunications carrier for *telecommunications traffic* that originates on the LEC's network.”⁴⁰ The FCC determined that such origination charges are not permissible reciprocal compensation charges for purposes of FTA §251(b)(5), and the FCC therefore prohibited LECs from assessing them.⁴¹ As the rule's language makes clear, this prohibition is a general one,

³⁹ Arbitration Award at 33-34.

⁴⁰ 47 C.F.R. § 51.703(b) (emphasis added).

⁴¹ Although the FCC has preempted the states' ability to set reciprocal compensation rates for ISP-bound traffic, this preemption in no way alters or limits the § 51.703(b) ban on origination charges. See, e.g., *Arbitrator's Recommended Decision, In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, Minnesota PUC Docket No. P5733,421/IC-02-1372, Decision No. 3-2500-15076-2 (Nov. 1, 2002) (finding that footnote 149 of the *ISP Order on Remand* “supports Level 3's argument that, despite the change in the rates for reciprocal compensation for ISP-bound traffic, the *ISP Remand Order* does not alter an ILEC's obligation under § 51.703(b) to transport this traffic to the point of interconnection.”), *adopted in Order Accepting the Arbitrator's Recommendation and Requiring Filed Interconnection Agreement*, Minnesota PUC Docket No. P5733,421/IC-02-1372, Decision No. 3-2500-15076-2 (Dec. 23, 2002) (noting that in the *ISP Order on*

applying to *any other telecommunications carrier* and to *all telecommunications traffic*. Section 51.703(b) is “unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.”⁴² Section 51.703(b) also covers any and all charges for traffic or facilities, as the FCC made clear in *TSR Wireless*.⁴³

ISP-bound traffic falls within this category of “telecommunications traffic,” as defined in § 51.701(b)(1), which states that for purposes of 47 C.F.R. Subpart H (including § 51.703(b)), “telecommunications traffic” means:

Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.⁴⁴

Nowhere did the arbitrators conclude that Level 3’s ISP-bound traffic fell within any of these exceptions. To the contrary, the arbitrators noted that “ISP traffic has not been defined as access traffic.”⁴⁵

Instead, the arbitrators attempted to exempt ISP-bound traffic from the requirements of §§ 51.701(b)(1) and 51.703(b) by interpreting those provisions to encompass exclusively local telecommunications traffic. Such a reading is prohibited by the FCC’s rules following the D.C.

Remand, the FCC stated that it was unwilling to take any action that would establish separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic. Qwest’s recommendation would do just that. For ISP-bound traffic, Qwest would have the Commission ignore FCC Rule 51.703(b) and shift to Level 3 all the costs of carrying Qwest’s originating traffic over Qwest’s network to the POI, while for voice traffic, Qwest would bear all the costs of transporting traffic originating on its network to the POI.” (footnote omitted)).

⁴² See *MCImetro Access Transmission Servs. v. BellSouth Telecomms, Inc.*, 352 F.3d 872, 881 (4th Cir. 2003) (“*MCImetro*”).

⁴³ See *TSR Wireless*, 15 FCC Rcd. at 11,181 ¶ 25.

⁴⁴ 47 C.F.R. § 51.701(b)(1).

⁴⁵ Arbitration Award at 34.

Circuit's vacatur and remand in *Bell Atlantic*, in which the court rejected the FCC's "end-to-end" jurisdictional analysis.⁴⁶ In the *ISP Order on Remand*, the FCC subsequently abandoned its local/non-local distinction and deleted the word "local" from this definition of telecommunications traffic in § 51.701(b)(1).⁴⁷ Consequently, the FCC's prohibition on origination charges in § 51.703(b) and *TSR Wireless* applies to *all* telecommunications traffic, unless it falls within one of enumerated exceptions.

The FCC made clear its rationale for these rules in the *TSR Wireless* and *Virginia Arbitration* orders. In each of these orders, the FCC stated that § 51.703(b) ensures that the costs of delivering telecommunications traffic to the POI are to be borne by the originating carrier, on the grounds that those costs relate to the originating carrier's network, and the originating carrier recovers those costs through the rates it charges to its own customers for making calls.⁴⁸

CenturyTel may already recover from its own customers the costs of carrying traffic to Level 3's POI from its own customers, and indeed profit from such recoveries. Level 3, like other LECs, provides connectivity to other network operators and charges a monthly fee to its customers for doing so. The services at issue in this case are but a source of revenue for CenturyTel. So this is not a case of Level 3 imposing costs on CenturyTel to the sole benefit of Level 3. In no way would CenturyTel subsidize Level 3's costs for providing service to its customers. To the contrary, as the D.C. Circuit noted in upholding *TSR Wireless*, § 51.703(b) ensures that LECs such as CenturyTel do not "game the system" by forcing interconnecting

⁴⁶ See *Bell Atlantic*, 206 F.3d at 6.

⁴⁷ See *ISP Order on Remand*, 16 FCC Rcd. at 9173-74 ¶ 46.

⁴⁸ See *TSR Wireless*, 15 FCC Rcd. at 11,177-78 ¶ 21; *Virginia Arbitration Order*, 17 FCC Rcd. at 27,064 ¶ 52.

carriers such as Level 3 to pay for dedicated facilities that LECs such as CenturyTel could conveniently carry at their own expense.⁴⁹

C. The Arbitrators' Characterization of Level 3's ISP-Bound Traffic as "Non-Local," Due to a Lack of Physical Presence or a POI in Every CenturyTel Local Calling Area, Is Inconsistent with Federal and Texas Law

By characterizing Level 3's ISP-bound traffic as "non-local"—based on what the arbitrators saw as Level 3's inability to confirm that its network would have a physical presence or POI in each of CenturyTel's local calling areas—the arbitrators acted contrary to federal law. The arbitrators simply asserted—without any quotation or citation to an FCC or Commission rule or judicial decision interpreting either—that they relied on "recognized standard definition of local traffic."⁵⁰ Yet the FCC and the courts have rejected as inconsistent with § 51.703(b) various incumbent LEC arguments that a lack of physical presence or POI within a local calling area renders telecommunications traffic "non-local" or subject to origination charges. The FCC has never relied on a LEC's physical presence in a local calling area as a basis for determining the jurisdictional nature of a particular class of traffic or the regulatory obligations for that class of traffic.

Most recently, the D.C. Circuit found that the location of the POI between a LEC and another telecommunications carrier is irrelevant when assessing payments from one carrier to the other.⁵¹ Consistent with § 51.703(b) and *TSR Wireless*, the court found that if a caller dials a number associated with the same local calling area, the LEC is barred from charging the other

⁴⁹ *Qwest*, 252 F.3d at 467.

⁵⁰ Arbitration Award at 22.

⁵¹ *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 645-49 (D.C. Cir. 2004).

telecommunications carrier for the cost of transporting the call, even if the POI is located outside of the local calling area.⁵²

Likewise, the Fourth Circuit recently found in *MCImetro* that an MCImetro-BellSouth interconnection agreement approved by the North Carolina Utilities Commission violated FTA § 251 and § 51.703(b) of the FCC's rules by permitting BellSouth to charge MCImetro for transporting BellSouth-originated traffic to MCImetro's distant point of interconnection, "even though that POI might be hundreds of miles away."⁵³ The Fourth Circuit therefore concluded that "we are left with an unambiguous rule [*i.e.*, § 51.703(b)], the legality of which is unchallenged, that prohibits the charge that BellSouth seeks to impose."⁵⁴

The Fourth Circuit in *MCImetro* followed the FCC's reasoning in the *Virginia Arbitration Order*, where the FCC rejected the efforts of Verizon to charge competitive LECs for transporting Verizon-originating traffic to a POI outside of Verizon's local calling area.⁵⁵ Verizon had attempted to require a competitive LEC to bear Verizon's costs of delivering Verizon-originating traffic between the Verizon-specified financial demarcation point the POI with the competitive LEC.⁵⁶ The competitive LECs sought a "bill-and-keep" arrangement, whereby each party would bear the cost of delivering its originating traffic to the POI

⁵² *See id.*

⁵³ *MCImetro*, 352 F.3d at 877. *See also id.* at 881 (holding that "[b]ecause the interconnection agreement allows BellSouth to charge MCI for traffic originating on the BellSouth network, it violates the 1996 Act as implemented by the FCC's current rules. Accordingly, we reverse the district court's grant of summary judgment in favor of BellSouth on this issue, and direct the district court to enter summary judgment in favor of MCI on this issue.").

⁵⁴ *Id.*

⁵⁵ *See id.*; *Virginia Arbitration Order*, 17 FCC Rcd. at 27,064-65 ¶¶ 52-53; Level 3 Initial Post-Hearing Brief at 28.

⁵⁶ *See Virginia Arbitration Order*, 17 FCC Rcd. at 27,064-65 ¶ 53.

designated by the competitive LEC.⁵⁷ The FCC adopted the competitive LEC's approach, finding that it was "more consistent with the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network; they are also more consistent with the right of competitive LECs to interconnect at any technically feasible point."⁵⁸ The arbitrators' decision in the present case is therefore wholly inconsistent with the FCC's approach, as the Arbitration Award would require Level 3 to bear CenturyTel's costs of delivering CenturyTel-originating traffic between the CenturyTel-specified financial demarcation point (*i.e.*, the limit of CenturyTel's local calling area) and the POI.

The arbitrators' decisions on Issues 2 and 3 are plainly inconsistent with these FCC and judicial pronouncements, which state clearly that a telecommunications carrier such as Level 3 need not have a physical presence or POI in the local calling area in order to avail themselves of the FCC's interconnection rules, including § 51.703(b). So long as Level 3's ISP-bound traffic does not fall within one of § 51.703(b)'s enumerated exceptions—and the D.C. Circuit's findings in *Bell Atlantic* make plain that it would not—CenturyTel is prohibited from collecting origination charges from Level 3, and the Commission is precluded from adopting an interconnection agreement that would enable such charges.

Indeed, the arbitrators' findings are wholly inconsistent with the findings in Commission Docket 24015, in which the arbitrators found that lack of a physical presence in the local calling area does not necessarily allow for the imposition of origination charges:

⁵⁷ See *id.*

⁵⁸ *Id.* at 27,065.

While the Arbitrators recognize that FX and FX-type services are provisioned differently, due to differences in ILEC and CLEC network architectures and local calling scopes, the Arbitrators are not persuaded that the differences in provisioning methods should mandate different classification and/or compensation.⁵⁹

Finally, these FCC and judicial pronouncements clarify that the arbitrators' request for further Level 3 network design information is irrelevant for purposes of deciding the arbitration issues or choosing contract language.⁶⁰ The arbitrators' continuing attempts to determine Level 3's physical presence in CenturyTel's service areas have no bearing on the question of whether to allow or prohibit CenturyTel's origination charges. The FCC's rules simply preclude CenturyTel from assessing origination charges against any ISP-bound traffic, including Level 3's ISP-bound traffic.

III. THE ARBITRATORS ERRED IN REFUSING TO ADOPT THE FCC'S DEFINITION OF "BILL-AND-KEEP"

The arbitrators inexplicably erred in refusing to adopt the FCC's definition of "bill-and-keep," as stated in the *ISP Order on Remand*, for the proposed interconnection agreement

⁵⁹ *Revised Arbitration Award, Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution re Inter-Carrier Compensation for "FX-Type" Traffic Against Southwestern Bell Tel. Co.*, PUC Docket No. 24015, at 30 (filed Aug. 28, 2002). *See also* Level 3 Initial Post-Hearing Brief at 28-37.

⁶⁰ *See, e.g.*, Arbitration Award at 14; Decision Matrix, Issue 1, Arbitrators' Position (Arbitration Award at 52). Given CenturyTel's status as a rural telephone company with a valid § 251(f) exemption exempts CenturyTel from the single POI requirement of FTA § 251(c)(2), Level 3 has agreed that it will "pick up" all traffic at a POI within each CenturyTel serving area by building or leasing transport to that point. Tr. 27:10-14, Tr. 147:17-20, Tr. 196:25-197:9, Tr. 295:24-296:2, Tr. 431-23:432:4. But this arrangement in no way alters the nature of Level 3's ISP-bound traffic as telecommunications traffic subject to § 51.703(b) of the FCC's rules.

between Level 3 and CenturyTel.⁶¹ The FCC itself has chosen a “bill-and-keep” regime as the interim compensation regime for ISP-bound traffic—a regime that remains in effect.⁶²

First, the arbitrators persist in characterizing Level 3’s proposed services as “non-local” ISP-bound traffic that somehow falls outside the FCC’s interconnection requirements for telecommunications traffic. As noted in parts I and II above in relation to Issues 1, 2, and 3, the arbitrators have made an impermissible distinction between “local” and “non-local” ISP-bound traffic, asserting that the former category is subject to the same FCC interconnection requires as local telecommunications traffic, whereas the latter category is not. The arbitrators’ assertion that the FCC has maintained a concept of “local call” or “local calling area” in its rules regarding origination charges and reciprocal compensation⁶³ is flatly contradicted by the FCC’s revision of the definition of “telecommunications traffic” in § 51.701(b)(1)⁶⁴ and by the repeated applications by the FCC and the courts of § 51.703(b) to prohibit origination charges for traffic transported to a POI outside of the local calling area.⁶⁵

Second, the arbitrators mischaracterize the Revised Arbitration Award in Docket No. 24015. In Docket No. 24015, the arbitrators rejected SWBT’s argument—which the arbitrators appear to have endorsed in this proceeding⁶⁶—that the *ISP Order on Remand* applies only to ISP-bound traffic that originates and terminates in the same local calling area: “[A]ll ISP-bound traffic, whether provisioned via an FX/FX-type arrangement or not, is subject to the

⁶¹ See Arbitration Award at 37-39.

⁶² See *ISP Order on Remand*, 16 FCC Rcd. at 9153 n.6 (defining “bill-and-keep”), 9187 ¶ 78 (establishing interim regime).

⁶³ Arbitration Award at 38.

⁶⁴ See parts I.B, II.B above.

⁶⁵ See part II.C above.

⁶⁶ See Arbitration Award at 38.

compensation mechanism contained in the FCC's *ISP Order on Remand*.”⁶⁷ Thus, the arbitrators' conclusions regarding Texas law are likewise erroneous.

IV. THE ARBITRATORS FAILED TO COMPLY WITH THE COMMISSION'S COMPULSORY ARBITRATION RULES

The Arbitration Award also merits reconsideration by the Commission because the arbitrators failed to comply with the Commission's rules for compulsory arbitrations in interconnection disputes.⁶⁸ Section 21.95(t)(1) of the Commission's substantive rules requires the arbitrators to issue a Proposal for Award based on the record of the arbitration hearing.⁶⁹ Section 21.95(t)(2) grants to the parties 10 days from the issuance of the Proposal for Award to file exceptions to that Proposal for Award, specifying any alleged ambiguities or errors.⁷⁰ Only within 10 days of the receipt of any exceptions may the arbitrators then issue an Arbitration Award.⁷¹

In the instant arbitration, however, the arbitrators simply issued a final Arbitration Award, ignoring the provisions in §§ 21.95(t)(1) and (2) and depriving Level 3 of the opportunity to address the arbitrators' ambiguities and errors in the Arbitration Award.⁷² Without reconsideration and modification by the Commission, the Arbitration Award is therefore invalid under the Commission's own rules.

⁶⁷ *Docket 24015 Revised Arbitration Award* at 31.

⁶⁸ See P.U.C. SUBS. RULE 21.95.

⁶⁹ P.U.C. SUBS. RULE 21.95.(t)(1).

⁷⁰ P.U.C. SUBS. RULE 21.95(t)(2).

⁷¹ P.U.C. SUBS. RULE 21.95(t)(3).

⁷² See Arbitration Award at 1. Level 3's motion for reconsideration remains proper, however, as it objects to the arbitrators' Arbitration Award. See P.U.C. SUBS. RULES 21.75 (permitting motions for reconsideration of a final Arbitration Awards), 21.95(w) (prohibiting motions for reconsideration of a Proposal for Award).

CONCLUSION

For the reasons stated above, this Commission should reconsider and modify the Arbitration Award to conform the Arbitration Award and interconnection agreement language to the requirements of federal and Texas law.

Respectfully submitted,

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31 March 2004

CERTIFICATE OF SERVICE

I hereby certify that the original and 19 copies of the foregoing *Motion for Reconsideration of Level 3 Communications, LLC in Docket No. 26431*, was filed via hand-delivery on this 31st day of March, 2004, addressed to the following:

Filing Clerk, Central Records
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78701

and I hereby certify that I have this day sent this document, via regular U.S. Mail, postage pre-paid on this 31st day of March, 2004, and/or via hand-delivery on this 31st day of March, 2004, addressed to the following:

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